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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 652

CARL E. RING,

Petitioner,

v.

HAROLD SPINA, EDWARD HEYMAN, WALTER HANNAN, and THE AUTHOR'S LEAGUE OF AMERICA, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SECOND CIRCUIT

CARL E. RING,
Petitioner.

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TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, Carl E. Ring, prays for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit to review the judgment of that Court in this cause filed, January 9th, 1951.

Nature of the Action

This is an action for treble damages for Anti-Trust Law violation commenced June 14, 1944. There are three Court of Appeals decisions. In the first, an injunction against compulsory arbitration pending litigation was granted,

Ring v. *Spina,* 148 F. 2 (d) 647, and the opinion contains a statement of the facts. On the second appeal, the denial of a right to trial by jury was reversed. *Ring* v. *Spina,* 166 F. 2(d) 546.

The Special Verdict

After a long jury trial, petitioner objected to a special verdict and asked for submission on a general verdict to avoid confusion (p. 228), but the court submitted on three special verdicts:

1. Have the defendants violated the Anti-Trust Laws?

   The Jury answered "Yes".

2. Assuming defendants have violated the Anti-Trust laws, has plaintiff suffered injury to his business or property by reason of the violation of the Anti-Trust laws?

   The Jury said "No".

3. If so, how much? Not answered.

   The District Courts opinion states (p. 339):

   "That, the M. B. A. constituted an illegal agreement in restraint of trade and commerce was held by the Court of Appeals in Ring v. Spina, CCA, 2, 1945, 148 F 2(d) 647, based upon an analysis of alleged facts there set forth. Since those allegations have been amply established, it follows that the M. B. A. is illegal and so I charged the Jury, leaving it to them, however, to decide whether the Guild was a labor organization exempt from the Anti-Trust Laws under 15 U. C. C. A. Section 17. They decided that the Guild was not a labor organization, and I see no reason for rejecting their finding."

There was no appeal from this finding and no reversal. A motion to set aside the special verdict on the second question only and grant a new trial was not decided by the District Court and was not considered by the Court of Appeals.

An injunction was granted. On appeal the injunction was vacated, but the finding of illegality sustained.

Relief Sought

Petitioner now seeks to reinstate the injunction and obtain a new trial on the issue of damages because of important questions involved.

The Illegal Conspiracy

The respondent, the Dramatists Guild of the Author's League of America constitutes a conspiracy in violation of the Anti-Trust Laws to control the business of the speaking stage throughout the United States. This monopoly is maintained by virtue of an agreement known as the "Minimum Basic Agreement" (M. B. A.) Signed by substantially every playright (2200) in the United States, including the individual defendants (see court opinions).

The M. B. A. forbids any author from doing business with any show producer except under the terms of and at the prices fixed by the M. B. A. and all contracts must be countersigned and approved by the Guild. No producer can acquire any copyright interest until he signs the M. B. A. and agrees to abide by all its terms.

Statement of the Case

After petitioner had invested $57,000.00 in a Broadway show in 1944, one Irving Gaumont, the producer who had signed the M. B. A. went broke. Petitioner then signed an

agreement with the individual defendant authors, May 6, 1944 (Exhibit 3, p. 277) by which petitioner would continue the production and cooperate with the authors to liquidate the defaulting producer.

Petitioner was compelled next day to forfeit this contract because it was not in conformity with the terms of the illegal M. B. A. and because petitioner refused to sign the M. B. A. (see opinions).

The Court of Appeals acknowledges this saying, "Plaintiff had unsuccessfully tried to get a contract with the Authors eliminating Gaumont." The first Court of Appeals opinion clearly stated that Petitioner then signed the M. B. A. under economic duress to prevent the collapse of the show and the loss of $57,000. After a hearing in the United States District Court all Gaumont's rights were assigned to Petitioner for which Petitioner paid $6,659 (p. 280). Petitioner thereupon brought the show to opening in New Haven, Connecticut, May 18, 1944, at a cost of $140,000.

As to its merits, Spina's agent, one Edmund Pauker, 25 years a Broadway show agent, and an original Defendant herein, said (p. 43) on examination before trial:

> "I even hold today that if and when this play will be done in New York, it will be one of the biggest successes."

Lee Shubert, the greatest of all showmen, testified (p. 74):

> "I told Mr. Ring that I thought the play had a good chance, but it needed a lot of changes—I told him it was too large, too cumbersome, too many people, that it needed some changes in the cast and some changes in the play."

Shubert stated he would put up $25,000, which Petitioner declined.

The newspaper reports are in the records (pp. 284 to 295).

The Authors decreed that there would be no changes in the scenery, the acting, or the cast without their consent, because the Minimum Basic Agreement so provided (p. 59).

The Petitioner, thereupon repudiated the M. B. A. at New Haven on May 20, 1944, changed the opening date from May 21st to May 22nd in Boston and authorized the staff to make such changes as it thought best in accordance with the general criticisms. The Authors, on May 25, 1944, advised Petitioner by telegraphic notice (Plaintiff's Exhibit 11, p. 296) that under the terms of the M. B. A. Petitioner would forfeit and lose all his rights, his license under the copyright, unless he restored all changes in the play as well as in the cast within three days. Similar notice was sent to the theater owners (p. 297).

Petitioner refused to comply on the ground that the M. B. A. was illegal and the show could not reopen after three days.

Spina demanded arbitration to declare petitioner's forfeiture of rights. The Guild joined in the demand (p. 302). The Court of Appeals enjoined the arbitration.

It is apparent that the Guild seeks to exercise a monopoly greater than that granted in the copyright. By a combination of all copyrights the Guild seeks to control and monopolize things beyond the scope of the grant, that is, the making, designing, buying and selling of scenery and the hiring and discharging and training of actors, and thus control the expenditure of all funds in the show without incurring any liability or responsibility.

An Injunction Issued by the District Court Was Unjustifiably Set Aside by the Court of Appeals Giving a Judicial Green Light to the Continuance of the Illegal Conspiracy Without Due Regard for Public Policy.

After the verdict, the District Court in its opinion said (p. 342):

> "The defendant authors are members of the Guild which is a conspiracy in restraint of trade and they have applied the force and effect of that conspiracy in connection with "Stove Pipe Hat". There is nothing to indicate that in the absence of an injunction the defendants will not continue to enforce the M. B. A."

The Court of Appeals vacated the injunction, saying that to sustain it:

> "We should have to decide that the agreement in fact was a conspiracy forbidden by the Anti-Trust Laws."

and

> "On the other hand, the League is naturally concerned that it shall not be held to be a conspiracy in violation of the Anti-Trust acts. It vigorously protests its innocence and its beneficence; it is conscious of no wrong doing and asserts that its existence is essential to the protection of authors and composers."

This overlooks the finding of the Jury which was sustained and is contrary to the doctrines of this court recently restated in *U. S.* v. *National Association of Real Estate Boards,* decided May 8, 1950, that:

> "An agreement shown either by adherence to a price schedule or by proof of consenual action fixing uniform or minimum prices is itself illegal under the Sherman Act no matter what end it was designed to serve."

There was no legal justification for vacating the injunction. The suggestion of the Court of Appeals that Petitioner had not proved a "dangerous probability" of a repetition of the wrong done to him individually is without merit except to say that it is an acknowledgment of the Court of Appeals that a wrong has been done to the Petitioner entitling him to damages, at least nominal damages which would warrant substantial counsel fees.

The Court's statement that Petitioner "doesn't even intimate that he will ever seek to produce another play" is immaterial and ignores the record.

A petition for mandamus sworn to May 31st, 1949 by this Petitioner, filed with the Court of Appeals, to obtain compliance with the Mandate on the second appeal, said:

> "The Petitioner has spent considerable time in the last two years in research for a musical comedy concerning the life of P. T. Barnum."

An important question this court should decide is, whether the Petitioner must disclose his future business plans to the conspirators in order to obtain an injunction after the conspiracy and its application against the Petitioner have been proved.

The Petitioner Was Injured by the Courts Holding that the Illegality of the M. B. A. Nullified Production Rights for Which the Petitioner Had Paid Substantial Sums.

The Court of Appeals held that the Petitioner by signing the M. B. A. even though as a victim under economic duress, agreed to carry on the conspiracy as part of the consideration for his production rights. Therefore, said the Court when Petitioner repudiated the M. B. A. it was impossible to apportion between the legal and illegal con-

sideration and the contract is invalid and Petitioner lost all his production rights thereby.

Petitioner paid $6,659 for the production rights, he paid Spina $5,000 for the music orchestrations and invested $140,000, believing that he had the legal right to produce. He did have such rights on May 6th in his private contract (p. 277) with the Authors which was forfeited because not in compliance with the M. B. A., and he had $140,000. Now he has neither because he signed the illegal M. B. A. under compulsion and repudiated it. The illegality of the M. B. A. cost Petitioner his production rights. The misleading charge to the jury printed as an appendix herein precluded the jury from considering this as an element of injury or damage. Loss of production rights caused Petitioner to lose his investment.

The Authors who were conspirators can keep the $5,000 and get their play back, the Guild who created the conspiracy goes scot free, the lifting of the injunction being a judicial green light to proceed with its monopoly, and the Petitioner gets nothing.

This is contrary to the rule of *Bigelow* v. *R. K. O.*, 327 U. S. 251, 265 that public policy requires the wrongdoer to bear the risk of uncertainty of apportionment, which his own wrong has created, and,

> "the constant tendency of the Courts is to find some way in which damage can be awarded where wrong has been done."

The contract of May 4, 1944 between Ring and Spina (p. 277) provided that all disputes would be settled by Victor Samrock, the Manager who had been brought into the show by Spina. Had this contract not been forfeited for noncompliance with the M.B.A., the disputes could have been settled on the spot by an experienced show manager. Instead there was an attempt at compulsory arbitration

under the illegal M.B.A. (pp. 299-304). Such compulsory arbitration as a condition upon which one can enter a business is itself a violation of the Anti-Trust Laws. *Paramount* v. *U. S.*, 34 Fed. (2) 984, 988 affirmed 282 U. S. 30.

This was injury to Petitioner in his business and property.

The Charge to the Jury on Damages for Anti-Trust Violation is Prejudicial, Misleading and Contrary to Public Policy and the Decisions of This Court.

Petitioner asked the Court (p. 223) to charge, in conformity with the decisions of this court, that even if the Guild is a labor Union, the M. B. A. is not in furtherance of any labor policy, but it is illegal per se for price fixing of property rights. The Court charged (p. 214) that if the Guild is a labor union there is no violation of the Anti-Trust Laws, because—

> "I have come to the conclusion that if it is a labor organization then the Minimum Basic Agreement constitutes a collective bargaining agreement which would represent the nominal activities in the attainment of the legitimate objectives of a labor organization."

Judge Clark pointed out in the first appeal that there is not one word in the M. B. A. about labor relations, but solely the regulation of the prices and terms of sale and license of copyright property. If this charge is correct, inventors can defeat the patent pool cases by forming a Union.

The Erroneous Charge on the First Question Prejudiced Consideration of the Second

Though Petitioner was successful on the first question, the charge that the M. B. A. was legal, if the Guild was a Union was wrong and prejudicial on the second question.

It told the Jury that there could be no legal injury and the M. B. A. would be legal if the Guild was a Union.

The jury should have been told that the M. B. A. was illegal per se and contrary to public policy under any circumstances.

Since there could be no illegal injury to the petitioner if the Guild was a union, the jury might well feel that failure of the Guild to organize itself into a Union could hardly create an illegal injury of $140,000. It would be fixing a penalty of $140,000 for not forming a Union, a verdict difficult for any jury to render.

Misleading Charge on Injury

The Court gave a charge of liability which is a highly misleading and prejudicial summation for the defendants citing numerous grounds not suggested in the record nor by counsel upon which defendants could win with almost complete disregard for the evidence or merits of the petitioner's claims (pp. 215-219). This can be seen only by reading that portion of the charge, and it is reprinted as an Appendix herein.

For instance the Court charged that if the jury found that petitioner abandoned the show because he *thought* he had a poor script, the jury should answer the second question "No" and charged the petitioner with the burden of proof. Objections were overruled (p. 224).

This and similar grounds if material at all were affirmative defenses the burden of proof of which should be on respondents.

The jury was confused because it asked a re-reading of the (p. 235) charge on preponderance of evidence.

This charge was wrong because there was considerable other uncontradicted evidence of invasion of petitioner's

rights, which would justify answering the second question, "Yes" whether the show stayed open or closed.

How can the Petitioner's thoughts be material? He was asked why he closed the show and on objection was not allowed to answer. Injury must come from respondents' acts not Petitioner's thoughts.

Spina's letter to the Guild June 7, 1944 refutes abandonment (p. 301) by showing Ring still claimed management rights.

Because of the conspiracy petitioner lost all his production rights in the show and could keep the show open only as a copyright violation because it no longer had any legal existence, or by involuntary compliance with the illegal M. B. A.

The respondents having demanded forfeiture of production rights under the M. B. A. are estopped from claiming that the show could have stayed open.

The unreasonable and prejudicial nature of the charge should induce this Court to intervene and grant a new trial under the authority of *Hall* v. *Weare,* 92 U. S., 729; *Wallace* v. *U. S.,* 291 F. 972; *Pullman* v. *Hall,* 46 F. 2(d) 399.

The Guild, in Furtherance of the Conspiracy Refused to Refund $1500 Advance Royalties on Instructions From the Author and Petitioner. The Erroneous Withdrawal of This Issue Raises Important Questions Concerning Injury and Damages Under the Anti-Trust Laws Which Should Be Settled by This Court.

When it appeared on May 6, 1944, that the show might collapse because of Gaumont's default, and not open on May 18, he paid $1,500 advance royalties to the Guild for

Spina's account to extend the production date from May 7th to October 7th.*

The M. B. A. provides that all advance royalties shall be paid to the Guild and none shall be refunded (Art. 4, Sec. 1D).

When Ring settled with Gaumont May 12th he agreed to pay $6,659 (p. 282) for Gaumont's rights, $5,159 cash and $1,500 by obtaining return of the royalty. He gave Gaumont a post-dated check to be cashed if the Guild refused to pay back the $1,500.

On May 16th, Spina and Ring sent a letter directing the Guild to refund $1500 to Gaumont. The Guild refused and Gaumont cashed Ring's check June 7th. This suit was started June 14, 1944, including a demand for $1500 damages to be trebled.

The District Court took the issue from the Jury (p. 343) over Petitioner's objection (p. 190), on the ground that a stipulation limited the case to "treble damages for violation of the Anti-Trust Laws" (p. 345). The District Court said there was no refusal of the Guild to pay (p. 345) though it still has the money.

The Court of Appeals said the Petitioner—

> "did not prove that before June 14, 1944 (date of commencement of action), the League had availed itself of the Agreement (M. B. A.) to impose any condition upon the return of the money."

This is difficult to understand because the Court contradicts itself on the previous page, saying:

> "When Spina wrote the letter, May 16th, to the League demanding that it return the money to Gaumont, the

---

* A full cast in rehearsal and all scenery purchased for opening May 18th was acceptable and substantial compliance with the requirement of production May 7th, the author himself having selected the opening date and attended rehearsals.

> League should have unconditionally complied with it, particularly as it should have been regarded as a demand of the Plaintiff as well as of Spina because the Plaintiff witnessed it. The League refused this demand when on May 29th it required the Authors and the Plaintiff to sign the supplemental agreement (p. 313) for that imposed a condition."

To sign any such agreement, petitioner would have nullified his repudiation of the M. B. A.

Gaumont was obviously not injured by the Guild's refusal, because he merely cashed Ring's check, but Ring was injured.

Is a Second Demand Necessary to Create Liability for Damages Under the Anti-Trust Laws?

The Court of Appeals justifies the withdrawal of the issue from the Jury on the narrow technicality that Petitioner should have but did not make a second demand upon the League or Guild after Gaumont cashed Petitioner's check.

The suggestion of the Court as to what steps the Guild might have taken after such a second demand are immaterial because the League didn't take such steps.

There are these other complete answers.

FIRST: No further demand was necessary by Petitioner to create the liability, Spina by reason of his attorney's presence, recited in the settlement agreement (p. 80), had actual notice of Petitioner's obligation to pay Gaumont if the Guild didn't.

Notice to Spina is constructive notice to his co-conspirator, the League. The League is liable for the natural and probable consequence of its acts and $1500 damage to Petitioner is such consequential damage.

Second: The suit itself is a demand. The District Court so ruled without objection (p. 191) and the Court of Appeals should not on its own motion now hold otherwise.

Third: There was such a demand.

The Petitioner's brief on appeal quoted testimony of the Petitioner from page 147 of the Transcript of just such a demand, as follows:

> "Q. What happened with regard to the $1500? A. I gave him (Gaumont) my check for $1500.
>
> The Court: You didn't get the $1500.
>
> A. And I didn't get the $1500 from the Guild.
>
> Q. Was an application or demand made to the Guild to get the money? A. Yes."

This means Petitioner demanded the money for himself after paying Gaumont and Petitioner who gave the testimony so contends.

The Court of Appeals said this testimony "Certainly referred to Spina's letter of May 16th."

This was clearly a question of fact for the jury to determine.

It is enough to say that the evidence would justify the jury in finding a demand if the jury had been charged that such demand was necessary.

Nevertheless, the Court of Appeals maintained that—

> "The Judge was right in taking the item from the Jury."

There must have been some doubt and confusion because the Court said:

> "It follows, however, that the judgment must not adjudicate any rights the Plaintiff may have to the money, and it is to be understood that our affirmance leaves those rights unaffected."

The assistance of this Court is necessary if the Petitioner is to have an adjudication of his claim for damages for violation of the Anti-Trust laws, after seven years of litigation, a long jury trial and three appeals.

A Motion for New Trial Was Not Decided by Either Court

The Petitioner moved immediately to set aside the verdict of "NO" on the second question as contrary to the law and facts.

It was argued at length on the ground that there was uncontradicted conclusive evidence of some injury and damage.

The jury cannot under the guise of passing on credibility disregard positive undisputed testimony.

> *C. & O. Railway* v. *Martin,* 283 U. S. 209;
> *Penn. R.R. Co.* v. *Chamberlin,* 288 U. S. 333.

In *Kelly* v. *Jackson,* 6 Pet. 622, Judge Storey said that no Judge should hesitate to grant a new trial under such circumstances:

> "Unless the jury are vested with authority to disregard the rules of evidence by which liberty and estate of every citizen are guarded and supported."

The motion was ignored and not decided by the District Court which on the facts in this case is an abuse of discretion to be corrected on appeal.

The Court of Appeals disposed of the motion saying:

> "The Plaintiff complained that the evidence was conclusive—contrary to the jury's verdict—that his business suffered injury",

but

> "It is a complete answer * * * that if a party does not ask the judge to withdraw an issue, the verdict is conclusive save for a motion for new trial."

Petitioner moved not only for judgment notwithstanding the verdict, but also for a new trial under Rule 59.* The latter was stressed in the Court of Appeals.** It was not decided.

When both motions are so made in the alternative the Petitioner is entitled to a decision on each.

Montgomery Ward v. *Duncan*, 311 U. S. 243.

The technical limitations on motions to vacate a general verdict should not apply on this inconsistent special verdict.

Petitioner did, as the court stated ask that the "case go to the jury on only the question of causation and damage", but on the general verdict to avoid confusion (p. 228). This is immaterial on a motion for a new trial.

There are endless cases authorizing new trial for inadequacy of damages. The verdict of no damage is inadequate

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* Petitioner stated the motion in the District Court (p. 2161 of the Transcript of the Record), as follows:

> "Mr. Julien: Now the next motion I should like to argue is the question to set aside the jury's verdict with respect to the second question as contrary to law and contrary to fact, and for a new trial, or in the alternative for a verdict on that point notwithstanding the verdict of the jury."

** Petitioner's brief on appeal concluded as follows:

> "It is further respectfully urged that this Court set aside and vacate so much, and only so much of the special verdict of the Jury as answered the second question, 'No' and that this case be sent back for a new trial on the second and third questions heretofore submitted to the Jury with the direction that on a new trial the Jury be instructed to answer the second question 'Yes' as to all defendants."

in the face of such positive uncontradicted testimony and the finding of the court that Petitioner's property rights in the show were destroyed by repudiating the illegal M.B.A.

Questions Raised

The questions sought to be raised are the foregoing, as well as the points on appeal (p. 362).

Reason for Allowing the Writ

The Court of Appeals in vacating the injunction said:

> "We hasten to add that we leave open all legal questions which such issues involve; we wish to make it entirely clear that we are not to be understood either to throw any doubt upon or to affirm what we said when we granted the temporary injunction."

This leaves the entire theatrical world as well as the Petitioner in doubt on a future course.

The Petitioner is barred from further participation in the theatrical world unless he signs the M. B. A. which the Court of Appeals says will invalidate any production contract.

The final outcome of this litigation with the finding of violations of the Anti-Trust Law, and allowing no recovery for its resulting injury and damage and the denial of an injunction after great expense and several years of litigation will discourage private Anti-Trust suits and put a greater enforcing burden on the public officials.

Judge Clark on the first Appeal said:

> "Plaintiff is precisely the type of individual whom the Sherman law seeks to protect",
> and

"Consideration of public policy demands court intervention in behalf of such a person",

and

"Any other conclusion would mean that for many, perhaps most, victims of restraint of trade, private remedies under the Sherman Act would be illusory, if not quite non-existent,"

and

"But much more is here involved than merely an agreement for the production of a single play; under attack is a broad plan for controlling the dramatic productions of the country."

CONCLUSION

Wherefore, Petitioner prays that this Petition for Writ of Certiorari be granted, that the injunction against enforcement of the M. B. A. be reinstated and that Petitioner have a new trial on the issue of damages together with such other relief as may be proper.

Respectfully submitted,

CARL E. RING,
Petitioner.

Union City, New Jersey,
March 17th, 1951.

APPENDIX

The charge to the jury on the second question.

The second question submitted to the jury was:

2. Assuming defendants have violated the Antitrust Laws has plaintiff suffered injury to his business or property by reason of such violation of the Antitrust Laws?

The charge with respect to this question was as follows:

Now we come to our second major question: The second major question is—now listen to it very carefully because in that question I want you to make an assumption which may differ from your decision—assuming that the defendants have violated the anti-trust laws—in connection with the second question I want you to assume that the defendants have violated the anti-trust laws. Making such an assumption, has the plaintiff suffered injury to his business or property by reason of such violation of the anti-trust laws? In other words, did the violation cause the injury? Injury means any financial damage to the plaintiff's business or property.

Now, in getting into this question we are entering a field very much like the ancient song, "Who killed Cock Robin?" Who killed it? It is undisputed that Ring lost money in his one theatrical venture. He claims that he and his associates invested approximately $140,000 in this enterprise, and that that money is all down the drain. What caused that loss? Was it because the script was a poor script? Was it because the music was inadequate? Did Ring abandon the show because he thought it was a poor script, or that the music was inadequate? Was it because the play was poorly produced? Was it because the production staff was incompetent? Was it because Ring abandoned it because he thought that the staff was incom-

petent? Did he run out of money and is that the reason why the loss was caused? Was the loss caused by the generally hazardous and speculative nature of theatrical business?

If you find that any one of the causes I have mentioned is the responsible factor in producing Ring's financial loss, then you will answer the question No.

If you find that the loss was caused by reason of anything done by the defendants which is forbidden in the anti-trust laws, then your answer to the question will be Yes.

Now, what do we mean by cause? And particularly what do we mean when injury is caused by a violation of law?

I have tried to think of a suitable illustration which might convey to you that idea. A person doing some physical act, that is easy to visualize. It is a little harder to visualize loss caused by violation of law which is, after all, an abstraction of the mind. Let me give you one illustration that may perhaps aid you in thinking along the lines that the statute requires.

Most of you drive cars. And you know, of course, that there are laws which regulate speed limits. Now let us suppose that one is driving a car down Park Avenue, and let us suppose that the speed limit is 30 miles an hour. When he approaches a crossing and the light turns red, and driving at 30 miles an hour he stops within 30 feet, or twenty feet, everything is all right; nobody is hurt; everything is satisfactory. But the next day he drives down the same street, and this time he violates the law. He is driving at 40 miles an hour; and driving at 40 miles an hour it takes him 40 feet to stop, and again the light turns red, and the driver, being eager to stop before he

crosses the line, because already pedestrians have begun to cross, jams on his brakes very hard, with the result that the passenger in the back of the car is pitched forward, strikes the front of the car, and is injured. The violation of the law caused the injury to the passenger. There is a direct causal relationship between the driving at 40 miles an hour and the blow to the passenger's head. Had he been driving at 30 miles an hour the passenger would not have been hurt.

The third day, driving down Park Avenue at 40 miles an hour, the light is green, nothing in the way, but a boy is playing ball in an adjacent ball field, and the ball goes sailing through the air and smashes through the car window and hits the passenger in the head. The passenger is injured while the driver is violating the law, but the injury to the passenger is not caused by the violation of the law.

So what I want you to do in analyzing this case is to distinguish between injury while a law is being violated, injury after a law has been violated, and injury because of, by reason of, the violation of the law. In this case you will answer the second question Yes if the violation of the law was the direct and proximate cause of the injury. You will answer it No if it is not.

Now let me give you one other homely illustration: A little boy goes to the zoo, and in an open space an elephant is walking around, and like in some of our modern zoos this elephant is not really caged in. A boy has a balloon in his hand, and the elephant makes noises at the boy. The elephant reaches out his trunk and tries to take the balloon, but nothing happens. And after a while the balloon, like many balloons, collapses and breaks. The elephant has not caused the balloon to break.

The elephant seizes the balloon and steps on it,—the elephant has caused that balloon to break.

The elephant says to the little boy, "I will huff and I will puff and I will tear your balloon down"; and the boy says, "Well, in that case I will take a pin and stick it into the balloon"; and the boy sticks it into the balloon and the balloon is destroyed. The elephant has not caused that balloon to be destroyed.

Think through all of the events from the day we started, from the day Ring was in that hospital talking to Mrs. Nicosia right down to the day this action was commenced, and consider whether the violation of the law, assuming that there was a violation of the law, caused the injury. If this play collapsed like a balloon because it only had a few weeks life in it, and it died a natural death, then there was no causal relationship between the violation of the law and the loss of Ring's money. If Ring got tired of the play, decided that he had had enough of it, didn't have enough money, or whatever the reason was, and put a pin into it, then there was no causal relationship between the violation and the loss of Ring's money. If the Dramatists Guild or the defendants huffed and puffed but Ring decided to abandon the play for reasons of his own, because he thought he had a poor play or because he thought he did not have enough money, or because he thought the play was not going to succeed—then the violation of the law did not cause the loss. If the violation of the law, the enforcement of the Minimum Basic Agreement, the application of the power of the Dramatists Guild was like the elephant stamping on that balloon, then the violation of the law did cause the loss of Ring's money, and then the answer to that question will be Yes.

On this issue the burden of proof is upon the plaintiff. Ring must satisfy you by a fair preponderance of the evidence that the violation of the law caused the damage. If the evidence on this issue is evenly balanced, then the plaintiff has failed to meet and to carry his burden of proof.

If you find that the violation of the law did cause the damage, then the fact that later on for other reasons the play might have been a failure anyway is unimportant. If you find that the damage was caused by the violation of the law, then your duty is to answer the question Yes; although it may be your judgment that after he got to New York, or some other time he could not have made any money, that is another matter.

Now since by assumption we have in this case a combination in restraint of trade under this question, any act done by any member of the combination becomes the act of the whole combination if it is done in pursuance of the plan of the combination. And if any member of the League by means of the MBA causes the injury to the plaintiff, then the League too is responsible for the damage caused to him by reason of the violation of the law.

Those are the two basic questions, and now we come to the third one: the third one is, assuming that the defendants have violated the anti-trust laws, what is the amount of the damage, if any, suffered by the plaintiff by reason of this violation of the laws on the part of the defendants or any of them?

Now, of course, you do not have to answer question No. 3 if you have answered question No. 2 in the negative. It is only if you have answered question No. 2 in the affirmative that you have to concern yourself with question No. 3.

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Supreme Court of the United States

OCTOBER TERM, 1950

No. 650

CARL E. RING,

Petitioner,

against

HAROLD SPINA, EDWARD HEYMAN, WALTER HANNAN and THE AUTHORS' LEAGUE OF AMERICA, INC.,

Respondents.

BRIEF FOR THE AUTHORS' LEAGUE, RESPONDENT

We submit that none of the issues presented by petitioner is of such a character as to warrant review by this Court. The petition does not claim that the decision of the Court of Appeals is in conflict with that of any other such court, or of this Court. Nor is there a claim that the decision presents any issue of general importance or novelty. Petitioner claims only that the Court of Appeals was wrong in holding: 1) that the District Court's charge was correct; 2) that the District Court properly withheld an item of $1,500 from the jury; and 3) that in the exercise of discretion the District Court improperly issued an injunction. The decision of the Court of Appeals applied well-established rules of law to the specific questions presented.

Petitioner is wholly in error in stating (p. 3) that that Court sustained a finding that the activities of the Authors' League (through its Dramatists Guild) were illegal. On the contrary, it expressly stated it was not passing on this question:

> "• • • On the other hand the League is naturally concerned that it shall not be held to be a conspiracy

in violation of the Anti-Trust Acts. It vigorously protests its innocence and its beneficence; it is conscious of no wrongdoing, and asserts that its existence is essential to the protection of authors and composers. Such purposes would of course not protect it, if it is in fact a combination in restraint of trade or an attempted monopoly; but they are relevant in deciding whether we should decide issues in which the plaintiff has only the most shadowy interests. We hold therefore that the judgment should not have decided that, if the authors revive the play they must give the plaintiff an opportunity to 'produce' it on an equal footing with anyone else, and that it should have contained no injunction. However, we hasten to add that we leave open all legal questions which such issues involve; we wish to make it entirely clear that we are not to be understood either to throw any doubt upon, or to affirm, what we said when we granted the temporary injunction; we merely decide that the necessity for such affirmance does not arise" (p. 380).

The Nature of the Case

Plaintiff Ring (petitioner here) sought to recover from the Dramatists' Guild and the authors of a play, losses which he claimed to have sustained on the theory that a contract which the Guild had negotiated with theatrical producers (known as the M.B.A.) contained provisions which violated the Sherman Act. He also sought injunctive relief. The play closed during out-of-town tryouts for various reasons, one of which was a dispute between Ring and the authors about changes in the play. The Guild did not participate in that dispute nor in the closing of the play. The jury found the Guild had not caused any losses which plaintiff claimed he sustained.

The Facts

"Stovepipe Hat" was a musical play about Abraham Lincoln written by the defendants Spina, Heyman and Hannan (Finding 3, p. 346). On February 7, 1944, the authors entered into a contract with one Gaumont for the

production of the play, the terms being those set forth in the M.B.A. (Findings 5, 6, pp. 346, 347), a form of agreement which the Guild had negotiated with producers (Finding 23, p. 350). In addition and coincidentally therewith, Spina and Gaumont entered into two separate and distinct letter agreements by the terms of which Gaumont hired Spina as general supervisor of the artistic and musical phases of the production (Finding 7, p. 347).

These separate agreements, wholly unrelated to the M.B.A., also gave Spina rights in a "different capacity" than those he had under the M.B.A. and entitled him to exercise "greater supervision and control than playwrights have under the M.B.A." (Finding 8, p. 347).

On March 13, 1944, Ring became Gaumont's partner by contributing $25,000, and by May 4, 1944, his total investment had reached some $57,000 (Findings 9, 10, p. 347). As Gaumont seemed unable to obtain the money needed to finance the production, Ring commenced an action against Gaumont in the United States District Court "to acquire sole ownership of the Ring-Gaumont partnership and to enjoin Gaumont from interfering with the further production of 'Stovepipe Hat'" (Finding 13, p. 348; Defendant's Ex. A, pp. 305-309). Six days later, Ring and Gaumont entered into a stipulation of settlement "whereunder Gaumont assigned to Ring all of his rights of every kind in the various contracts previously entered into for the production of 'Stovepipe Hat'" (Finding 14, p. 348; Plaintiff's Ex. 6, pp. 280-283). Included, of course, were Spina's contracts as general supervisor of the play. And Ring expressly assumed *all* the contracts (p. 281).

During tryouts in New Haven and Boston, Ring manifested dissatisfaction with many elements in the show. For example, he told Helen Tamaris, the choreographer, that the dances were "un-American" (S. M. 235, 1551). He testified that he had become dissatisfied with Ross, the director (S. M. 236-238). He testified also that the show was a failure because Spina was incompetent (S. M. 357, 358). Although the play had opened under the title "Stovepipe

Hat", Ring changed its name to "Johnny Drummer" at the suggestion of a member of the cast (S. M. 331, 332). To this Heyman, one of the authors, objected because the name did not suggest the subject matter of the play (S. M. 715).

There appear to have been frequent altercations between Ring and others concerned with the production, including Spina. Ross, the director, testified that the attitude of Ring was not one of cooperation, as was to be expected of a producer, but was one of dictation (S. M. 1590).

Spina, testifying at length about his difficulties with Ring during the tryouts, stated that Ring had tried to prevent him from coming to the tryout in Boston at all, and that after he arrived there he had told him to get out of the theatre (S. M. 1366-1384). Ring, himself, admits that he told Spina "to go out front" (S. M. 243, 245). After this Spina left Boston and on May 25th sent a telegram to Ring claiming that his contracts had been breached (Plaintiff's Exhibit 11, p. 296, Finding 17, p. 349). Two days later Ring closed the play (Finding 18, p. 349).

At the time of closing, the salaries of the director and the choreographer and the current bills were unpaid (S. M. 493-498). The cast, which was to be paid each Saturday night, was not paid on the Saturday night of the closing, although Ring knew that the cast was to be paid on Saturday night and admitted that he did not have the money in Boston (S. M. 502).

Ring admitted that at the time of the closing of the show he had only a small amount in his personal bank account (S. M. 417, 420). As the Court found, Ring took no steps to produce the play at any time after he closed it on May 27th, 1944, and he disposed of the costumes and scenery (Finding 20, p. 349).

When the authors sought an arbitration of their controversies with Ring he brought this suit claiming that the M.B.A. was illegal because various of its provisions violated the Sherman Act. The issues involved in this contention are important and interesting but will not here be discussed because they were not decided by the Court of Appeals.

Argument

We submit that petitioner has no ground for complaint. The jury found against him on the very issue he agreed should be submitted: "The question of causation and damages" (p. 376); there is no basis for any complaint about the charge. The Court of Appeals properly vacated the injunction. And the $1,500 item was properly withdrawn from the jury.

POINT I

The injunction was properly vacated.

The Court of Appeals, finding that there was no probability that petitioner could again be affected by the alleged illegal conspiracy, found it unnecessary to determine whether it was, in fact and in law, illegal, and concluded, in the exercise of a sound equitable discretion, that there was no occasion for the issuance of any injunction. It supported its conclusion with numerous authorities. Petitioner has not attempted to challenge any of them.

He seeks to overcome the finding of the Trial Court that, except for this one venture, "he never was and is not now engaged in the business of producing plays" (p. 346), which was accepted by the Court of Appeals (p. 380), by reference to some statement in a mandamus petition not part of the present record. But this case must be decided on the basis of the testimony given at the trial.

Ring had no connection with the theatre and knew nothing about show business (S. M. 304). As a matter of fact, in his testimony he admitted:

> "I saw 'Show Boat' in 1932 and I don't think I saw a show from then until this thing started" (S. M. 300).

Surely the question of this injunction raises no issue of sufficient general public importance to justify this Court's intervention.

POINT II

Petitioner can claim no rights in the play.

Petitioner's discussion of this subject (pp. 7, 8) incorrectly suggests that it had some bearing on the issue of damages. That, however, is not the case. In colloquy between the Court and counsel it was agreed that the question of damages should be submitted to the jury on the assumption that plaintiff had no further rights in the play. And the Court so instructed the jury (p. 220)—to which, of course, no exception was taken. So we have here no question of "apportionment" of damages as suggested by petitioner (p. 8) and *Bigelow* v. *R.K.O.*, 327 U. S. 251, is wholly inapposite.

Moreover, this issue has nothing to do with the propriety of injunctive relief. Indeed, petitioner at the trial asked Judge Rifkind merely to leave the question open for possible adjudication in some other litigation! (p. 339). Naturally the Judge refused to do this. And with that conclusion there can be no reasonable disagreement.

Petitioner is in error in suggesting (p. 7) that the decision against his having any interest in the play rested on his having signed the M.B.A. It rested on the fact that what he obtained (by assignment from Gaumont) was a production contract which incorporated the M.B.A. As the Court of Appeals properly pointed out (pp. 377, 378), if the M.B.A. was illegal then no part of the contract could survive. Absent the terms fixed by the M.B.A. there were no terms—there was no meeting of the minds—no contract.

POINT III

There were no errors in the Court's charge.

a. Petitioner's first contention (p. 9) that it was error to permit the jury to pass on the issue of the Guild being

a labor organization is academic at this time since the jury found in his favor. Of course, the Guild has always claimed that it was entitled to a directed verdict on that subject, but it is unnecessary to discuss this contention now because the Court of Appeals did not pass on it.

b. There is no basis for petitioner's criticism of the charge as to damages (pp. 10, 11).

Petitioner has now concentrated on one single point, namely, an observation made by Judge Rifkind by way of illustration only contained in the following extract from the charge:

> "If this play collapsed like a balloon because it only had a few weeks' life in it, and it died a natural death, then there was no causal relationship between the violation of the law and the loss of Ring's money. If Ring got tired of the play, and decided that he had enough of it, didn't have enough money, or whatever the reason was, and put a pin into it, then there was no causal relationship between the violation and the loss of Ring's money" (p. 218).

Is Ring seriously contending that Judge Rifkind committed reversible error because there is no testimony to the effect that the play collapsed like a balloon and no witness said that the play "died a natural death"? Obviously, the use of this illustration did not have to be founded on precise testimony.

Reading the charge as a whole, and not piecemeal, it can be seen that the Court made it abundantly clear to the jury that if the illegal acts of the defendants caused the closing of the play, they would be responsible in damages. In four different portions of his charge, Judge Rifkind affirmatively stated the conditions under which the jury must find for plaintiff (see pp. 216, 217, 218, 219).

We doubt that it is necessary to reply to these objections at any length. It is elementary that a judge may comment upon the evidence and express his opinion on facts. As Mr. Chief Justice Hughes said in *Quercia* v. *United States*, 289 U. S. 466, at page 469:

"* * * In charging the jury, the trial judge is not limited to instructions of an abstract sort. It is within his province, whenever he thinks it necessary, to assist the jury in arriving at a just conclusion by explaining and commenting upon the evidence, by drawing their attention to the parts of it which he thinks important; and he may express his opinion upon the facts, provided he makes it clear to the jury that all matters of fact are submitted in their determination. *Carver* v. *Jackson,* 4 Pet. 1, 80; *Vicksburg & Meridian R. Co.* v. *Putnam,* 118 U. S. 545, 553; *United States* v. *Philadelphia & Reading R. Co.,* 123 U. S. 113, 114; *Capital Traction Co.* v. *Hof,* 174 U. S. 1, 13, 14; *Patton* v. *United States,* 281 U. S. 276, 288 * * *."

POINT IV

The $1,500 item was properly withdrawn from the case.

The petition (pp. 11-14) has dealt with this issue in a manner so confused and confusing that we believe it essential to state its real character. In the first place, there has been no decision whatever on petitioner's right to get this money, but merely a decision that it was not properly part of this anti-trust suit (pp. 375-376). Surely this Court should not concern itself with such an issue.

The question arose out of the settlement of Ring's action against Gaumont. The latter had deposited $1,500 with the Guild for the benefit of Spina and the other authors in order to obtain a postponement of the production (p. 343). The stipulation of settlement assumed that Gaumont would get the money back from the Guild and when repaid it would be credited on the amount of $6,659 which Ring had agreed to pay Gaumont (p. 282).

When the Guild was asked by Spina to return the $1,500 to Gaumont, it prepared and sent to Spina a memorandum. While the settlement stipulation contemplated that Gaumont (not *Ring*) would get this money back, the authors for whose benefit the money had originally been deposited

were not parties to that settlement agreement. Consequently, the status of that deposit and its return was left vague, and the Guild quite properly requested that a document be signed by all the parties instructing the payment of the money to Gaumont (Exhibit P, pp. 313, 314). That was never done (p. 344).

The subject of this claim was discussed at length at the trial between counsel and the Court (pp. 187-192). In his charge to the jury (p. 220) the Judge took this issue out of their hands. Petitioner took no exception to that action by the Court (pp. 222-227). Moreover, he at no time requested the Court to direct a verdict in his favor with respect to the $1,500 (see S. M. 1793, 1799).

Most of petitioner's argument on this head (e.g., pp. 13, 14) proceeds as if this were an action for money had and received. In that event his observations with regard to suit being a sufficient demand might be relevant. But then the action of the Trial Court in severing this claim was in exact accordance with the stipulation of the parties (p. 352). And if this claim be part of the anti-trust suit it was properly excluded from the jury's consideration because there was no proof that the alleged conspiracy in any way contributed to the withholding of the money; that there was a demand by petitioner that it be returned to him and a refusal based on the agreement.

Besides, if petitioner claims the $1,500 because it was part of his investment in the venture, as his counsel appears to have done (p. 274), then it would seem that he was precluded because the jury found that the losses which he sustained were not caused by any illegal acts of the Guild.

POINT V

Nothing was left undecided.

Petitioner claims (pp. 15, 16) that he was entitled to a decision on his motion for a new trial. But he has had such decision. For obviously the entry of judgment against his claim to be entitled to damages is such decision. Moreover, as we have seen, petitioner did not ask for a directed verdict on the issue of damages, but on the contrary agreed that it be left to the jury. Nothing has been set forth to show any reason why there should be a new trial on that issue.

There is nothing in *Montgomery Ward* v. *Duncan*, 311 U. S. 243 (p. 16), that is here relevant. There defendant had moved for a directed verdict and then, in the alternative, for judgment notwithstanding the verdict or a new trial. The District Court acted on that motion and gave judgment for defendant. The Circuit Court of Appeals reversed and directed judgment for plaintiff. This Court held only that, under these circumstances, defendant was entitled to have the District Court exercise its discretion whether or not there should be a new trial—that the issue survived the reversal. Here, however, there has been an affirmance and nothing has survived.

CONCLUSION

We submit that no reasons exist for allowing the writ.

Respectfully submitted,

ARTHUR GARFIELD HAYS,
Counsel for The Authors' League
of America, Inc.

ARTHUR GARFIELD HAYS,
JOHN SCHULMAN,
OSMOND K. FRAENKEL,
of Counsel.